FILED
AUG 5 1931
CHARLES ELMORE CROPLEY
CLERK

FILE COPY

No. 162

In the Supreme Court of the United States

OCTOBER TERM, 1931

UNITED STATES EX REL. ASPASIA POLYMERIS AND ANTIGONE POLYMERIS, PETITIONERS

v.

JOSEPH W. TRUDELL, IMMIGRATION INSPECTOR IN CHARGE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
Discussion	3
Conclusion	4
Appendix (Statutes and regulations involved)	5–8

CITATIONS

Case:	
Johnson v. *Keating ex rel. Tarantino*, 17 F. (2d) 50	4
Statutes:	
Act of May 26, 1924, c. 190, 43 Stat. 153, 155, 158, 161, 165:	
Sec. 4 (U. S. C., Title 8, sec. 204)	5
Sec. 10 (U. S. C., Title 8, sec. 210)	5–6
Sec. 13 (U. S. C., Title 8, sec. 213)	6–7
Sec. 23 (U .S. C., Title 8, sec. 221)	7
Regulations:	
Immigration Laws and Rules, January 1, 1930:	
Rule 3, subdivision F, par. 1	7
Rule 3, subdivision I, par. 2	8

In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 162

UNITED STATES EX REL. ASPASIA POLYMERIS AND Antigone Polymeris, Petitioners

v.

JOSEPH W. TRUDELL, IMMIGRATION INSPECTOR IN Charge

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The respondent does not oppose the issuance of certiorari in this case.

OPINIONS BELOW

The opinion of the District Court (R. 115) has not been reported. The opinion of the Circuit Court of Appeals (R. 127) is reported in 49 F. (2d) 730.

JURISDICTION

The judgment sought to be reviewed was entered on May 11, 1931. (R. 131.) A petition for rehear-

ing was denied on May 27, 1931. (R. 135.) The petition for certiorari was filed in this Court on June 13, 1931. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the petitioners, whom both courts below found to be aliens returning from a temporary visit abroad, were entitled to be admitted to this country without presenting an unexpired visa or permit.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 5–8.

STATEMENT

The petitioners are a mother and daughter who originally came to this country from Greece in 1909. They remained here continuously until 1923, except for a visit to Greece in 1913 and 1914. (R. 20, 22, 26, 41–42.) In 1923 they returned to Greece to see the husband and father of the petitioners, who was seriously ill. (R. 26, 43.) While they were in Greece he died. (R. 28, 44.) They sought at various times to obtain from the American Consul in Greece visas as alien residents returning from a temporary visit abroad. The Consul declined to issue such a visa. In 1929 they employed counsel in this country, who was unable to obtain a visa for them. (R. 90–99.) Finally he

advised the petitioners to obtain a British visa which would enable them to go to Canada and then to apply for admission to the United States at a border port of entry. (R. 32–33.) On August 2, 1930, they presented themselves at the border and sought admission. They were given a hearing before a Board of Special Inquiry, which refused to allow their admission on the ground that they were "persons not in possession of valid quota Consular Immigration visas." (R. 48, 84.) The petitioners then obtained a writ of *habeas corpus* from the District Court for the District of Vermont and that court ordered that they be discharged from custody. (R. 115–117.) On an appeal to the Circuit Court of Appeals for the Second Circuit, this decision was reversed and it was held that the petitioners had been properly excluded.

Both the District Court and the Circuit Court of Appeals found as a fact that they were returning from a temporary visit abroad. (R. 116, 129.)

DISCUSSION

We do not acquiesce in the propriety of the finding of the courts below that the petitioners were returning from a temporary visit abroad.

But on their finding that the petitioners were resident aliens returning from a temporary visit abroad, the question presented in this case is whether they may be excluded because they are not in possession of a valid visa or return permit. On

this issue the decision below is substantially in conflict with the decision of the Circuit Court of Appeals for the First Circuit in *Johnson* v. *Keating ex rel. Tarantino,* 17 F. (2d) 50, where it was held by a divided court that a person who was in fact an alien resident returning from a temporary visit abroad could not be excluded because he did not present a valid consular visa.

CONCLUSION

In view of this conflict of decisions, the respondent does not oppose the issuance of the writ of certiorari.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
NUGENT DODDS,
Assistant Attorney General.
CLAUDE R. BRANCH,
Special Assistant to the Attorney General.
HARRY S. RIDGELY,
ERWIN N. GRISWOLD,
Attorneys.

AUGUST, 1931.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

STATUTES

The Immigration Act of 1924 (Act of May 26, 1924), c. 190, 43 Stat. 153, 155, 158, 161, 165, provides in part as follows:

> SEC. 4. When used in this Act the term "non-quota immigrant" means—
>
> * * * * *
>
> (b) An immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad; * * *. (U. S. C., Title 8, Sec. 204.)
>
> * * * * *
>
> SEC. 10. (a) Any alien about to depart temporarily from the United States may make application to the Commissioner General for a permit to reenter the United States, stating the length of his intended absence, and the reasons therefor. Such application shall be made under oath, and shall be in such form and contain such information as may be by regulations prescribed, and shall be accompanied by two copies of the applicant's photograph.
>
> (b) If the Commissioner General finds that the alien has been legally admitted to the United States, and that the application is made in good faith, he shall, with the approval of the Secretary of Labor, issue the

permit, specifying therein the length of time, not exceeding one year, during which it shall be valid. The permit shall be in such form as shall be by regulations prescribed and shall have permanently attached thereto the photograph of the alien to whom issued, together with such other matter as may be deemed necessary for the complete identification of the alien.

(c) On good cause shown the validity of the permit may be extended for such period or periods, not exceeding six months each, and under such conditions, as shall be by regulations prescribed.

(d) For the issuance of the permit, and for each extension thereof, there shall be paid a fee of $3, which shall be covered into the Treasury as miscellaneous receipts.

* * * * *

(f) A permit issued under this section shall have no effect under the immigration laws, except to show that the alien to whom it is issued is returning from a temporary visit abroad; but nothing in this section shall be construed as making such permit the exclusive means of establishing that the alien is so returning. (U. S. C., Title 8, Sec. 210.)

* * * * *

SEC. 13. (a) No immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa * * *.

(b) In such classes of cases and under such conditions as may be by regulations prescribed immigrants who have been legally admitted to the United States and who depart therefrom temporarily may be admitted to the United States without being re-

quired to obtain an immigration visa. (U. S. C., Title 8, Sec. 213.)

* * * * *

SEC. 23. Whenever any alien attempts to enter the United States the burden of proof shall be upon such alien to establish that he is not subject to exclusion under any provision of the immigration laws; * * *. (U. S. C., Title 8, Sec. 221.)

REGULATIONS

Rule 3, Subdivision F, paragraph 1 (Immigration Laws and Rules, January 1, 1930, p. 122) reads as follows:

> No immigrant, whether a quota immigrant or nonquota immigrant, of any nationality shall be admitted to the United States unless such immigrant shall present to the proper immigration official, at the port of arrival, an immigration visa duly issued and authenticated by an American consular officer: *Provided,* That (a) aliens who have been previously lawfully admitted to the United States and who are returning from a temporary visit of not more than six months to Canada, Newfoundland, St. Pierre, Miquelon, Bermuda, Mexico, Cuba, and other islands included in the Bahama and Greater Antilles groups, or such aliens who are returning from a temporary visit to any other foreign country and who are in possession of a permit to reenter the United States issued in accordance with the provisions of section 10 of the immigration act of 1924, and (b) children born subsequent to the issuance of an immigration visa to the accompanying parent, if otherwise admissible, shall be permitted to enter the United States without an immigration visa.

Rule 3, Subdivision I, paragraph 2 (Immigration Laws and Rules, January 1, 1930, p. 126), reads as follows:

> An alien claiming to be a nonquota immigrant on the ground that he has been previously lawfully admitted to the United States and is returning from a temporary visit abroad shall not be admitted as such unless at time of arrival he shall establish that he has been previously lawfully admitted to the United States and is returning from a temporary visit abroad, and presents an unexpired valid immigration visa duly issued by an American consular officer designating the holder as such: *Provided,* That the presentation of an unexpired valid permit to reenter, duly issued to the holder thereof pursuant to the provisions of section 10 of the immigration act of 1924, shall be deemed to show prima facie that such holder is returning from a temporary visit abroad, and shall be accepted also in lieu of immigration visa: *And further provided,* That any alien who establishes that he has been previously lawfully admitted to the United States and is returning from a temporary visit of not more than six months to Canada, Newfoundland, St. Pierre, Miquelon, Bermuda, Mexico, Cuba, and other islands included in the Bahama and Greater Antilles groups shall be permitted to enter the United States without a passport, an immigration visa, or permit to reenter.

U. S. GOVERNMENT PRINTING OFFICE: 1931

FILE COPY

Office Supreme Court, U.
FILED
DEC 8 1931
CHARLES

No. 162

In the Supreme Court of the United States

OCTOBER TERM, 1931

UNITED STATES OF AMERICA EX REL. ASPASIA POLYMERIS AND ANTIGONE POLYMERIS, PETITIONERS

v.

JOSEPH W. TRUDELL, IMMIGRATION INSPECTOR IN CHARGE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
Summary of argument	7
Argument:	
I. The relators were not entitled to enter this country inasmuch as they had no visas or return permits	9
II. It was within the power of Congress to exclude aliens returning to this country after temporary visits abroad unless they have visas	13
III. The courts have no jurisdiction to review the action of a consul in refusing to issue an immigrant visa under any circumstances	14
IV. It does not appear that the consul at Athens acted arbitrarily in refusing to issue nonquota visas to the relators	23
Conclusion	31
Appendix	32–42

CITATIONS

Cases:	
Fok Yung Yo v. *United States*, 185 U. S. 296	16
Fong Yue Ting v. *United States*, 149 U. S. 698	16
Friedman v. *Kellogg*, 54 Wash. Law Rep. 846	21
Japanese Immigrant Case, The, 189 U. S. 86	14
Johnson v. *Keating*, 17 F. (2d) 50	11, 13, 24
Keller v. *United States*, 213 U. S. 138	14
Lapina v. *Williams*, 232 U. S. 78	14
Lem Moon Sing v. *United States*, 158 U. S. 538	15
Lidonnici v. *Davis*, 16 F. (2d) 532, certiorari denied, 274 U. S. 744	30
Low Wah Suey v. *Backus*, 225 U. S. 460	14
Mahler v. *Eby*, 264 U. S. 32	14
Seid Soo Hong, Ex parte, 23 F. (2d) 847	23
Spinella, In re, 3 F. (2d) 196	23
Tiaco v. *Forbes*, 228 U. S. 549	14
United States ex rel. Graber v. *Karnuth*, 30 F. (2d) 242, certiorari denied, 279 U. S. 850	23

Cases—Continued. Page

United States ex rel. Karolyi v. *Kellogg*, Law No. 71040, Sup. Ct. D. C. 21

United States ex rel. Komlos v. *Trudell*, 35 F. (2d) 281, certiorari denied, 280 U. S. 607 23

United States ex rel. Randozzo v. *Tod*, 297 Fed. 214 30

United States ex rel. Ulrich v. *Kellogg*, 30 F. (2d) 984, certiorari denied *sub nom. United States ex rel. Ulrich* v. *Stimson*, 279 U. S. 868 16, 21

United States ex rel. London v. *Phelps*, 22 F. (2d) 288, certiorari denied, 276 U. S. 630 22

Wong Wing v. *United States*, 163 U. S. 228 16

Statutes:

Act of May 22, 1918, c. 81, 40 Stat. 559 18

Act of March 2, 1921, c. 131, 41 Stat. 1217 18

Act of May 19, 1921, as amended, c. 8, sec. 2 (d), 42 Stat. 5, 6 30

Immigration Act of May 26, 1924, c. 190, 43 Stat. 153, 154, 155, 156, 157, 158, 159, 161, 162, 165, 166, 169—

Sec. 2 (U. S. C., Title 8, sec. 202) 32–33

Sec. 3 (U. S. C., Title 8, sec. 203) 33

Sec. 4 (U. S. C., Title 8, sec. 204) 33

Sec. 7 (U. S. C., Title 8, sec. 207) 34

Sec. 8 (U. S. C., Title 8, sec. 208) 35

Sec. 10 (U. S. C., Title 8, sec. 210) 35

Sec. 13 (U. S. C., Title 8, sec. 213) 36

Sec. 23 (U. S. C., Title 8, sec. 221) 37

Sec. 24 (U. S. C., Title 8, sec. 222) 37

Sec. 25 (U. S. C., Title 8, sec. 223) 37

Sec. 31 38

Miscellaneous:

General Instruction Consular, No. 926, Diplomatic Serial No. 273, issued by State Department Sept. 30, 1925 40–42

Immigration Laws and Rules of January 1, 1930—

Rule 3, subdivision F, par. 1 38

Rule 3, subdivision I, par. 2 39

Executive Order No. 4813, p. 100 18

Immigration Laws and Rules, May 1, 1917 (7th ed., August, 1922), par. A, p. 97 30

H. R. No. 350, 68th Cong. 1st Sess., pp. 10–12 20

In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 162

UNITED STATES OF AMERICA EX REL. ASPASIA POLYMERIS and Antigone Polymeris, petitioners

v.

JOSEPH W. TRUDELL, IMMIGRATION INSPECTOR IN Charge

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court for the District of Vermont (R. 74) is not reported. The opinion of the Circuit Court of Appeals (R. 79) is reported in 49 F. (2d) 730.

JURISDICTION

The judgment sought to be reviewed was entered May 11, 1931. (R. 83.) A formal order denying petition for rehearing was entered on May 27, 1931. (R. 86.) The petition for certiorari was filed in this Court on June 13, 1931, and was granted on

October 12, 1931. (R. 86.) The jurisdiction of this Court rests on Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the petitioners, whom both courts below found to be aliens returning from a temporary visit abroad, were entitled to be admitted to this country without presenting an unexpired visa or permit.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix (*infra,* pp. 32–42).

STATEMENT

This case originated upon a petition to the District Court for writs of *habeas corpus* by which the relators sought discharge from custody of the respondent, an immigration inspector. The petition contained the following allegations (R. 2–4):

The relators are a mother and daughter, who were born in Greece and are still citizens of that country, although they are residents of the City of New York. They came to the United States in 1909 and remained here continuously until 1923 except for a visit to Greece for about a year beginning in 1913. In 1923 they returned to Greece to see the husband of the older relator, who was seriously ill. While they were in Greece he died. In January, 1924, the daughter wrote to the American Consul at Athens, asking that she be given permission for an extended stay, and she received a

letter from him to the effect that her stay would be extended upon good cause being shown. The petition contains other allegations as to the attempts of the relators to obtain visas to return to this country. These attempts were unsuccessful. The facts in regard to this matter are discussed under point IV, *infra,* in which we contend that the Consul did not act arbitrarily in refusing to issue such visas.

The petition goes on to allege that the relators went to Montreal and on August 2, 1930, presented themselves at the United States Immigration Office at St. Albans, Vermont, and applied for readmission to the United States as returning residents; that a hearing was had before the Board of Special Inquiry; that the Board decided to exclude them, and that the Secretary of Labor upheld the decision of the Board. The petition also avers that "there was absolutely no evidence before the Board to support a finding that relators were not aliens previously lawfully admitted to the United States who were returning from a temporary visit abroad."

The return of the respondent (R. 4–10) justified detention of the relators on the basis of the decision of the Secretary of Labor, who evidently accepted the conclusions of the Board of Review that the relators were inadmissible because they were not in possession of valid immigration visas or return permits, and also because they were not returning from a temporary absence abroad. The transcript of the record of the hearing before the Board of Spe-

cial Inquiry was made part of the return. (R. 14–72.) The relators filed a traverse. (R. 73.) The case was heard on this record.

The relators admitted that they had no unexpired immigration visa or return permit of any kind issued by the United States. (R. 23, 28.) From their testimony before the Board it appears that they sailed from Cherbourg, France, to Montreal with a Greek passport, valid for Europe and Japan, a Japanese visa and a British visa, which was good for the United Kingdom and Canada for a "journey for the purpose of traveling." They were admitted as nonimmigrants at Quebec for three weeks. (R. 18–19, 29–30.) When examined by the Canadian immigration officer at Quebec they stated that they were going to Japan. Before the Board of Special Inquiry in this country, they admitted that they never had any intention of going to Japan, but obtained the Japanese visa and the British visa so that they could land in Canada and apply to the United States for admission. (R. 18–19, 29–30, 41–42.)

The relators testified that they wrote to the Consul at Athens in regard to a nonquota permit in 1924 and again in 1925, and retained a lawyer in Athens in 1926 to assist them; but although the Consul wrote them in 1924 that they would have to come to him in person about the matter, they never personally went to the Consulate until 1929. It does not appear that they ever made any formal

applications for visas until then. Visas were refused on the ground that they had stayed too long. (R. 16–18, 24, 46, 50, 54.) The record does not show exactly what information the Consul had at any time before 1929.

The District Court held that the relators should be discharged. In the course of its opinion, the court said that the relators were nonquota immigrants who had been previously admitted to the United States and were returning from a temporary visit abroad and that they were entitled to admission, even though they had no immigration visas or return permits. The court also said (R. 74–75):

> These aliens first came here and were legally admitted in 1909, and have had their domiciles here ever since. The evidence that their domiciles were and are here is emphatic—there is none to the contrary. In 1923 they went to Greece, intending to return within six months, but the illness and death of the husband of Aspasia—the father of Antigone—and the settlement of his sizable estate caused them to remain in Greece longer than they had originally intended. After this their return was delayed for a long time by the refusal of the Consul to give them visas.

The respondent appealed and filed assignments of error, which alleged (R. 77–78):

> The Court has erred in sustaining the writ of habeas corpus and discharging the relatrixes for the following reasons: